92-1624

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

EUGENIO OZUNA RAMIREZ, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit erred in affirming the conviction of Eugenio O. Ramirez, Jr. for conspiracy to possess marijuana and possession of marijuana, when such conviction was based upon insufficient evidence?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those in the caption as well as Jaime Barrera Lopez, Defendant; Eliseo De La Garza, Jr., Defendant; and Robert San Martin Delgado, Defendant.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 16

APPENDICES

Appendix A

United States v. Lopez, et al., 979 F.2d 1024 (5th Cir. 1992) (Opinion) ..... App. 1

United States v. Eugenio Ozuna Ramirez, Jr., No. M-90-159-S1-03 (Judgment) ..... App. 27

United States v. Eliseo De La Garza, No. 91-6116 (Denial of Petition for Rehearing) ..... App. 35

Appendix B

21 U.S.C. §841(b)(1)(B) ..... App. 36

TABLE OF AUTHORITIES

Page

CASES

Pinkerton v. United States, 328 U.S. 640 (1946).....13, 14

United States v. Aguirre Aguirre, 716 F.2d 293 (5th Cir. 1983) 14

United States v. Ascarrunz, 838 F.2d 759 (5th Cir. 1988)..... 8

United States v. Ayala, 887 F.2d 62 (5th Cir. 1989) ..7, 11

United States v. Cardenas Alvarado, 806 F.2d 566 (5th Cir. 1986)..... 8

United States v. Diaz-Carreon, 915 F.2d 951, *reh'g en banc denied*, 919 F.2d 735 (5th Cir. 1990)..... 10

United States v. Galvan, 693 F.2d 417 (5th Cir. 1982) 8

United States v. Gardea Carrasco, 830 F.2d 41 (5th Cir. 1987) 11

United States v. Glasgow, 658 F.2d 1036 (5th Cir. 1981)..... 11

United States v. Hernandez-Beltran, 867 F.2d 224 (5th Cir.), *cert. denied*, 490 U.S. 1094 (1989)..... 14

United States v. Leed, 981 F.2d 202 (5th Cir. 1993) 9

United States v. Lopez, 979 F.2d 1024 (5th Cir. 1992) 1, 10, 12

United States v. Manotas-Mejia, 824 F.2d 360, *reh'g en banc denied*, 831 F.2d 1062 (5th Cir.), *cert. denied sub nom. Ramirez-Rios v. United States*, 484 U.S. 957 (1987) 10

United States v. Manzella, 791 F.2d 1263 (7th Cir. 1986)..... 7

TABLE OF AUTHORITIES – Continued

Page

United States v. Menesses, 962 F.2d 420 (5th Cir. 1992) 7, 14

United States v. Michel, 588 F.2d 986 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979) 14

United States v. Moreno-Hinojosa, 804 F.2d 845 (5th Cir. 1986) 11

United States v. Pierce, 893 F.2d 669, *reh'g en banc denied*, 897 F.2d 528 (5th Cir. 1990) 13, 14

United States v. Rena, 981 F.2d 765 (5th Cir. 1993) 7

United States v. Rodriguez, 831 F.2d 162 (7th Cir. 1987), *cert. denied*, 485 U.S. 965 (1988) 7, 9

United States v. Rosas-Fuentes, 970 F.2d 1379 (5th Cir. 1992) 11

United States v. Simmons, 918 F.2d 476 (5th Cir. 1990) 9

STATUTES

18 U.S.C. §2 ..... 3, 14

21 U.S.C. §841(a)(1), (b)(1)(B) 2, 3, 10

21 U.S.C. §846 ..... 2, 3, 7

28 U.S.C. §1254(1) 2

No. _____

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Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, EUGENIO OZUNA RAMIREZ, JR., requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on December 8, 1992.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 979 F.2d 1024. It is reproduced in Appendix A to this petition (beginning at page App. 1). There was no formal opinion of the United States District Court for the Southern

District of Texas, McAllen Division. A copy of the judgment entered is reproduced in Appendix A to this petition (beginning at page App. 27).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 1992. (App. A, p. App. 1). A timely petition for rehearing filed by Eliseo De La Garza, a co-defendant, was denied on January 11, 1993. (App. A, page App. 35). This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved herein include:

21 U.S.C. §846 – Attempt and Conspiracy

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. §841(a)(1) – Unlawful Acts

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. §841(b)(1)(B) – Penalties

> Because of its length, this statute is reproduced in full in Appendix B (beginning at p. App. 36).

18 U.S.C. §2 – Principals

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

This appeal arises from the criminal convictions of Eugenio O. Ramirez, Jr. on one count of conspiracy to possess marijuana with intent to distribute and one count of possession of marijuana with intent to distribute.

Eugenio O. Ramirez, Jr. was arrested on May 16, 1990. He was indicted along with Jaime Barrera Lopez and Eliseo De La Garza, Jr., on June 12, 1990, on one count of conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §846, and one count of intentionally and knowingly possessing marijuana with intent to distribute in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(B) and 18 U.S.C. §2. This indictment was dismissed on December 20, 1990, and the Government filed a superseding indictment charging De La Garza in the conspiracy count. The charges against the other defendants

remained the same. Following a four-day trial, Ramirez was found guilty on both counts. He was sentenced to two concurrent 71-month prison terms and concurrent four year terms of supervised release. Following a timely appeal challenging the sufficiency of the evidence, the Fifth Circuit affirmed the convictions.

The arrest and subsequent convictions of Ramirez resulted from a series of meetings between Ramirez and/or the other defendants, two undercover McAllen Police Officers (Anacleto Botello and Israel Saldivar), and a confidential informant. The first such meeting occurred on May 1, 1990, at the home of the confidential informant where Agent Botello was introduced to De La Garza and expressed a desire to purchase 200 to 300 pounds of marijuana. De La Garza explained that he personally could not get the marijuana but that he knew someone who could. The parties discussed the price, and Agent Saldivar showed De La Garza a large sum of cash. No marijuana was exhibited or exchanged at this meeting. Following this initial meeting, the confidential informant, the undercover police officers, De La Garza and Ramirez met several times. No marijuana was exhibited or exchanged at any meeting.

On May 16, 1990, Agents Botello and Saldivar, the confidential informant and Ramirez met at a convenience store in McAllen. The agents and the confidential informant followed Ramirez to property located at "2 Mile Line" to conclude the transaction. No marijuana was exhibited or exchanged at this time; eventually the agents left the site. At 6:30 p.m. the officers again met Ramirez and the confidential informant. Ramirez requested that the agents follow him to get the owner of the marijuana, but they

refused and agreed to meet Ramirez and the owner at the place where the marijuana sale was to be concluded. Ramirez left the Circle K alone, and the surveillance vehicle followed him again to the location on "2 Mile Line" where he picked up an unidentified individual. The agents and the informant went to the home where they believed the marijuana would be located. The informant talked with Delgado and an unidentified individual at this location. Delgado then got into his yellow Ford vehicle and gestured the agents to follow him down the street. The load vehicle containing the marijuana, a white Dodge Ram pickup with a camper, was already at this location. Upon arrival, Delgado and the unidentified individual got out of Delgado's vehicle and sat on a picnic table. The agents and the informant waited until Ramirez and Lopez arrived in the blue Suburban the agents had seen Ramirez driving earlier. Ramirez remained in the Suburban. The agents and the informant approached the back of the load vehicle and looked in at the marijuana. Lopez got out of Ramirez's vehicle, walked over to the load vehicle, looked into the truck and asked agent Saldivar and the informant what they were doing. One or both of them responded that they were looking at the marijuana. Lopez then walked over and sat at the picnic table. The bust signal was given shortly thereafter. Ramirez, Lopez, and Delgado were arrested; the fourth man escaped and was never identified. De La Garza was not present and was later arrested.

REASONS FOR GRANTING THE WRIT

While the Fifth Circuit recognizes that possession of marijuana may be established wholly by circumstantial evidence in some cases, by affirming the district court's conviction in this case, the Fifth Circuit has sanctioned so far a departure from the accepted and usual course of judicial proceedings, that this Court must take notice by exercising its power of supervision.

The evidence in this case establishes, at most, that Ramirez acted as a broker between buyer and seller and that he was arrested in the presence of marijuana. This is not sufficient to sustain either his conspiracy conviction or his possession conviction. There is no evidence that Ramirez or any defendant loaded the marijuana in the vehicle; there is no evidence that Ramirez or any defendant owned the vehicle; there is no evidence that Ramirez or any defendant drove the vehicle to the place of arrest or brought the marijuana from some other location. There is no evidence that Ramirez or any defendant exercised any control over the marijuana nor that anyone had the keys to the load vehicle nor that anyone even had knowledge that there was marijuana in the rear of the load vehicle. There is no evidence that Ramirez or any defendant opened the load vehicle, touched the marijuana or attempted to conclude a sale. The Government simply failed to establish that any of the defendants exercised sufficient dominance or control of the contraband to establish possession. Accordingly, the Fifth Circuit erred in upholding the convictions.

A. The Conspiracy Charge

In order to convict Ramirez of conspiracy under 21 U.S.C. §846, the Government was required to prove beyond a reasonable doubt (1) the existence of an agreement to violate the narcotics laws, (2) Ramirez's knowledge of the agreement, and (3) his voluntary participation in it. *See United States v. Ayala*, 887 F.2d 62, 67 (5th Cir. 1989). The Government failed to sustain this burden. While a conspiracy conviction may be supported by circumstantial evidence, *United States v. Rena*, 981 F.2d 765, 771 (5th Cir. 1993), the Government must do more than pile inference upon inference upon which to base a conspiracy charge. *United States v. Menesses*, 962 F.2d 420, 427 (5th Cir. 1992). This is precisely what the Government sought to do in this case. The record is simply devoid of any substantial evidence from which the jury could logically infer that an agreement existed between any of these defendants to violate the narcotics laws. If no agreement existed between any defendant, then Ramirez's conviction for conspiracy cannot stand.

There is no evidence that De La Garza voluntarily participated in any agreement; the evidence merely shows that De La Garza introduced the potential drug buyers (Agent Botello and Agent Saldivar) to Ramirez because De La Garza was unable to provide the desired drugs himself. This will not support a conspiracy charge because it is not sufficient that De La Garza played " 'the role of a finder or broker, [or] a bringer together of seller and buyer.' " *United States v. Rodriguez*, 831 F.2d 162, 167 (7th Cir. 1987), *cert. denied*, 485 U.S. 965 (1988) (quoting *United States v. Manzella*, 791 F.2d 1263 (7th Cir. 1986)). Although De La Garza was present at four meetings, the

evidence fails to show that he was anything other than a mere bystander. The Fifth Circuit has stated that mere close association will not alone support an inference of participation in a conspiracy. *See United States v. Ascarrunz*, 838 F.2d 759 (5th Cir. 1988).

Similarly, there is insufficient evidence that Delgado voluntarily participated in any agreement to violate the narcotics laws. The evidence reveals that Delgado, after a conversation with the confidential informant, the contents of which is unknown, got in his vehicle and gestured for the agents to follow him down the street. After he led them to the location of the load vehicle, he parked behind the load vehicle, got out of his vehicle and sat on a picnic table. Delgado fled from the scene when the bust signal was given. It would require a stretch of the imagination to infer from this evidence alone that an agreement to violate the narcotics laws existed and that Delgado knew of it and voluntarily participated in it. There is no evidence that Delgado associated with any other defendant. The Government has done no more than present evidence that places Delgado in " 'a climate of activity that reeks of something foul.' " *United States v. Cardenas Alvarado*, 806 F.2d 566, 570 (5th Cir. 1986) (quoting *United States v. Galvan*, 693 F.2d 417, 419 (5th Cir. 1982)).

If De La Garza and Delgado were not parties to an agreement to violate the narcotics laws, then there must have been an agreement between Lopez and Ramirez in order to sustain Ramirez's conviction on the conspiracy count. Again, however, the evidence fails to support the existence of any such agreement. There is little direct evidence regarding Lopez's role. The evidence shows that

Ramirez made three trips to a location on Two Mile Line titled in the name of Lopez's wife. During these three trips, Ramirez spoke to an unidentified individual. The contents of these conversations is unknown. A white truck with "J & L Construction" on the side was observed at this site; this truck belonged to Lopez. Ramirez told Agent Botello and Agent Saldivar before the final trip on May 16 that he was going to get the owner of the marijuana. After this trip, Ramirez arrived at the scene of the ultimate arrest with Lopez. This is the only time Lopez is affirmatively identified.

Based on Ramirez's statement regarding the owner and his subsequent appearance with Lopez, at best a jury might infer that Lopez owned the marijuana. But to find that a conspiracy existed in which Ramirez voluntarily participated, a jury must have inferred that Ramirez went to the location on Two Mile Line three times to discuss the acquisition of marijuana, that the unidentified person in the J & L Construction truck with whom Ramirez spoke was Lopez, and that Ramirez and Lopez entered into an agreement to violate the narcotics laws. There is simply not sufficient evidence to support this final inference. At most, a jury could infer that Ramirez, like De La Garza, was acting as a broker attempting to bring together a buyer and a seller of marijuana. This is not sufficient to support a conspiracy conviction. *See Rodriguez*, 831 F.2d at 167; *United States v. Leed*, 981 F.2d 202, 205 (5th Cir. 1993) (citing *United States v. Simmons*, 918 F.2d 476, 484 (5th Cir. 1990)) (defendant's presence at the scene and close association with those involved in a conspiracy are insufficient factors to establish conspiracy).

The Fifth Circuit erroneously found a conspiracy between Ramirez and agent Botello. *Lopez*, 979 F.2d at 1029. The Fifth Circuit cannot affirm Ramirez's conspiracy conviction on the ground that he conspired with the confidential informant or the undercover government agents. *See United States v. Manotas-Mejia*, 824 F.2d 360, *reh'g en banc denied*, 831 F.2d 1062 (5th Cir.), *cert. denied sub nom, Ramirez-Rios v. United States*, 484 U.S. 957 (1987).

Because there is insufficient evidence that any of the defendants entered into an agreement to violate the narcotics laws, the Fifth Circuit erred in affirming Ramirez's conviction on the conspiracy count.

B. The Possession Charge

To convict Ramirez of violating 21 U.S.C. §841(a)(1) the Government was required to prove beyond a reasonable doubt that Ramirez (1) knowingly (2) possessed marijuana (3) with intent to distribute. *United States v. Diaz-Carreon*, 915 F.2d at 951, 953, *reh'g en banc denied*, 919 F.2d 735 (5th Cir. 1990). The Government failed to sustain this burden because there is insufficient evidence that Ramirez possessed the marijuana.

1. Knowledge and Intent to Distribute

It is not necessary to address the knowledge or intent elements because, as discussed below, there is clearly insufficient evidence that Ramirez possessed the marijuana. If he did not possess it, then the issues of knowledge and intent are moot. Nevertheless, it is notable that

the Government presented no evidence – direct or circumstantial – that Ramirez knew about the marijuana in the back of the load vehicle. The evidence shows that he remained in the Suburban from the time he arrived at the scene until he was arrested.

2. Possession

a. Actual versus Constructive Possession

Possession of marijuana may be actual or constructive. *Ayala*, 887 F.2d at 68. There is no evidence that Ramirez or any defendant actually possessed the marijuana seized in this case. Additionally, there is no evidence that Ramirez or any defendant constructively possessed the marijuana. Constructive possession is " 'the knowing exercise of, or the knowing power or right to exercise dominion and control over the proscribed substance.' " *Id.* (quoting *United States v. Gardea Carrasco*, 830 F.2d 41, 45 (5th Cir. 1987) [quoting *United States v. Glasgow*, 658 F.2d 1036, 1043 (5th Cir. 1981)]). *See also, United States v. Rosas-Fuentes*, 970 F.2d 1379, 1382 (5th Cir. 1992) (reversing conviction of defendant for conspiracy and possession because insufficient evidence that defendant knew or had any control over marijuana concealed in gas tank of vehicle in which he was a passenger). The marijuana seized in this case was at the location before any of the defendants arrived. Mere presence in an area where drugs are found is insufficient to support a finding of possession. *Rosas-Fuentes*, 970 F.2d 1382 (quoting *United States v. Moreno-Hinojosa*, 804 F.2d 845, 847 (5th Cir. 1986). The record in this case is devoid of substantial

evidence linking Ramirez or any defendant to the marijuana.[1]

The Fifth Circuit erroneously affirmed Ramirez's conviction for possession on the ground that Ramirez owned the load vehicle. *Lopez*, 979 F.2d at 1031. There is no evidence, however, that Ramirez owned the vehicle. In fact, Agent Botello testified that a search of the title revealed that the load vehicle was registered to Chapa Construction.[2] There is no evidence linking any defendant to Chapa Construction. There is no evidence that any defendants' fingerprints were found on the contraband. Further, there is no evidence that any defendant loaded the marijuana into the load vehicle or that any defendant drove the vehicle to the scene of the arrest. There is also no evidence that any defendant possessed keys to the load vehicle. Finally, there is no evidence of

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[1] There is testimony that Lopez approached the vehicle and asked Agent Saldivar and the confidential informant what they were doing, and one or both of them responded that they were looking at the marijuana. There is also testimony that Ramirez told Agent Botello and Agent Saldivar that he was going to get the owner of the marijuana and later showed up with Lopez. These pieces of evidence without more hardly show that Lopez had dominion and control over the marijuana.

[2] Agent Botello had testified earlier that they were looking for Ramirez's vehicle as the load vehicle on May 16. This information was based on a hearsay statement of the confidential informant and is not supported by any evidence. As noted above, Agent Botello himself provided contradictory testimony. Additionally, Agent Saldivar testified that the load vehicle was different from the gray Ford truck they had seen Ramirez drive to Alamo Enterprises on May 2, 1990, and to his home on May 8, 1990. There is absolutely no evidence that the load vehicle found at the scene of the arrest belonged to Ramirez.

any statements or acts by any defendant linking him to the marijuana. Taking the evidence in the light most favorable to the government and drawing all logical inferences, there is simply no evidence that Ramirez or any defendant *possessed* the marijuana. Accordingly, the Fifth Circuit erred in affirming Ramirez's conviction for possession.

b. Vicarious Possession

Under the vicarious liability doctrine of *Pinkerton v. United States*, 328 U.S. 640 (1946), a co-conspirator may be found guilty of a substantive offense committed by his co-conspirator in furtherance of the conspiracy, as long as the co-conspirator's acts are within the reasonably foreseeable scope of the conspiracy. *United States v. Pierce*, 893 F.2d 669, 675 *reh'g en banc denied*, 897 F.2d 528 (5th Cir. 1990).

Even if there was sufficient evidence to sustain Ramirez's conviction for conspiracy, which Ramirez specifically denies, his conviction for possession cannot be upheld on the theory that he vicariously possessed the marijuana by virtue of his co-conspirator's possession under the *Pinkerton* theory. As discussed above, there is insufficient evidence that any of the other defendants possessed the marijuana, either actually or constructively, in furtherance of the conspiracy. It is necessary that at least one co-conspirator commit all the elements of the substantive offense for another to be vicariously liable for it.

Even if there was evidence that one defendant possessed the marijuana, Ramirez's conviction of possession still could not be upheld under the *Pinkerton* theory because the jury was not given a proper *Pinkerton* instruction. Therefore, Ramirez's possession conviction cannot be sustained on this basis. *See, Pierce,* 893 F.2d at 676; *United States v. Michel,* 588 F.2d 986, 999 n. 13 (5th Cir.) *cert. denied,* 444 U.S. 825 (1979).

c. Aiding and Abetting

Ramirez's conviction for possession might be upheld if there was sufficient evidence that he aided and abetted another in the commission of the substantive offense, because he was charged in the indictment with violating 18 U.S.C. §2. In order to sustain a conviction for aiding and abetting, the Government must prove beyond a reasonable doubt that the defendant aided and abetted *both* the possession and distribution of the drug. *United States v. Hernandez-Beltran,* 867 F.2d 224, 226 (5th Cir.), *cert. denied,* 490 U.S. 1094 (1989). The defendant must have associated with the criminal endeavor and participated in an act intending to further the venture, but mere presence and association alone are only factors to be considered and are insufficient alone to sustain a conviction for aiding and abetting. *Id.* There must be evidence that the defendant aided and abetted each and every element. *United States v. Aguirre Aguirre,* 716 F.2d 293 (5th Cir. 1983); *United States v. Menesses,* 962 F.2d 420 (5th Cir. 1992) (reversing conviction of defendant for conspiracy and abetting because no evidence of involvement other

than proximity to contraband and association with conspirators).

The Government failed to prove that Ramirez possessed the marijuana or that he aided and abetted in the possession. Again, it is necessary that at least one defendant commit the substantive offense in order to convict another of aiding and abetting. There is insufficient evidence that any defendant committed the substantive offense.

Even if another defendant possessed the marijuana, there is no evidence that Ramirez aided or abetted such possession. There is no evidence that Ramirez encouraged another defendant to obtain the marijuana or assisted another defendant in acquiring the marijuana. Additionally, there is no circumstantial evidence from which such an inference can logically be drawn. Therefore, Ramirez's conviction cannot be upheld on this basis.

There is simply no basis which the Government asserted that would uphold Ramirez's conviction. The Government failed to sustain its burden, and Ramirez's convictions on both counts should have been reversed. By affirming the district court's judgment, the Fifth Circuit erred.

In sum, Ramirez was convicted of conspiracy and possession. His convictions are not supported by sufficient evidence. Even viewed in the light most favorable to the Government, a jury could not reasonably, logically, and legally infer from the evidence presented that Ramirez was guilty of each element beyond a reasonable doubt. The Fifth Circuit erred in affirming the conviction and departed from the judicial standard of mandating

that the Government sustain its burden and prove each and every element of each offense. Accordingly, Ramirez is entitled to have his conviction reversed and requests that this Court grant his petition for a writ of certiorari to review the decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 7, 1993

APPENDIX A

UNITED STATES of America
Plaintiff-Appellee,

v.

Jamie Barrera LOPEZ, Eugenio Ozuna Ramirez, Jr., Eliseo De La Garza, and Robert San-Martin Delgado, Defendants-Appellants.

No. 91-6116.

United States Court of Appeals
Fifth Circuit

Dec. 8, 1992.

Nancy M. Simonson, J.A. Canales, Corpus Christi, Tex., Richard H. Garcia, McAllen, Tex., for Lopez.

William M. Mills, Atlas & Hall, McAllen, Tex., for Ramirez.

Bobby Flores, McAllen, Tex., for Delgado.

L. Aron Pena, Edinburg, Tex., for Garza.

Paul T. Cappuccio, Associate Deputy Atty. Gen., U.S. Dept. of Justice, Washington, D.C., Paula Offenhauser, Kathlyn G. Snyder, Asst. U.S. Attys., Ronald G. Woods, U.S. Atty., Houston Tex., for the U.S.

Appeal from the United States District Court for the Southern district of Texas.

Before KING, WILLIAMS, and SMITH, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

At a joint trial, Defendants-Appellants Jamie Barerra Lopez, Eugenio Ozuna Ramirez, Jr., Eliseo De La Garza,

and Robert San-Martin Delgado were each convicted on one count of conspiring to possess and distribute marihuana in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(B). Lopez, Ramirez, and Delgado were also each convicted on one count of possessing marihuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) and of 18 U.S.C. § 2. Both counts relate to a series of negotiations beginning May 1, 1990, leading up to the sale of 432 pounds of marihuana on May 16, 1990. Delgado and Lopez were sentenced to 78 months in prison, Ramirez was sentenced to 71 months, and De La Garza to 66 months. Each appellant faces a four year term of supervised release following imprisonment.

Appellants raise six issues on appeal. All four challenge the sufficiency of the evidence, Lopez challenges the admission of a remote conviction, De La Garza and Ramirez challenge the denial of their Motions for Severance, and De La Garza complains of the denial of his Motion for New Trial. We affirm the convictions and the rulings of district court.

I. FACTS AND PRIOR PROCEEDINGS

Between May 1 and May 16, 1990, McAllen undercover police officer Anacleto Botello and narcotics agent Israel Saldivar worked through a confidential informant to negotiate the purchase of a large quantity of marihuana. The informant initially introduced Botello to De La Garza on May 1, 1990. Botello testified that he asked De La Garza about purchasing 200 to 300 pounds of marihuana at a cost of $425 per pound. On May 2, De La

Garza introduced the officers to Ramirez, who confirmed the purchase quantity and price.

Several attempts to get together on a deal misfired for one reason or another. Finally on May 16, in the midafternoon, the informant called the agents, who met Ramirez at a Circle K convenience store. Ramirez then led the agents to the "Two Mile Line" property owned by Lopez to conclude the transaction. Because the transfer was to take place at the back of the property, however, the officers refused to close the deal and left. At 6:30 p.m., the officers again met Ramirez and the informant at the Circle K. Botello testified that Ramirez wanted the officers to accompany him to pick up the owner of the marihuana, but the officers persuaded Ramirez to meet them at the load vehicle containing the drugs. The surveillance team followed Ramirez first to the two Mile Line property, where he picked up an unidentified man, and then to the load vehicle's location.

Meanwhile, the informant directed the officers to a house on Harvey Street. When they arrived, they did not see the load vehicle. Two men came out of the house, spoke with the informant, got into a car, and led the officers down the street to another house. Both officers testified that one of the men, Delgado, motioned for them to follow. When they reached the other house, Delgado pulled into the driveway and parked behind a white pickup with a camper top. Delgado and his companion then left the car to sit at a nearby picnic table. After waiting awhile, Saldivar and the informant went to the pickup to see whether it contained marihuana. At that point, Ramirez arrived with Lopez, who got out of the passenger side of Ramirez's vehicle. According to

Saldivar, Lopez walked up, looked into the truck, and asked what Saldivar was doing, to which Saldivar responded that he was checking out the marihuana. Having seen the drugs, Saldivar then signaled Botello, who gave the bust signal. Other officers appeared and arrested Ramirez, Lopez, and Delgado. The fourth man escaped and was never identified. De La Garza was not present and was arrested later. Following a three day trial, a jury rendered guilty verdicts on all counts, and all defendants timely appealed.

II. DISCUSSION
SUFFICIENCY OF THE EVIDENCE

All four appellants charge that the evidence presented in the district court was insufficient to sustain their convictions. Because decisions about the credibility of the evidence are the province of the jury, we review both the evidence and the inferences drawn from the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 77, 80, 62 S.Ct. 457, 468, 469, 86 L.Ed. 680 (1942). In weighing the evidence in this case we follow the Supreme Court's holding that circumstantial evidence is not intrinsically different from testimonial evidence. *United States v. Bell*, 678 F.2d 547, 549 n. 3 (5th Cir.1982) (en banc), *aff'd*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *Id.* at 549; *see also United States v. Vasquez*, 953 F.2d 176, 181 (5th Cir.), *cert. denied sub nom. Gomez v. United States*, ___U.S.___, 112 S.Ct. 2288, 119

L.Ed.2d 212 (1992). Thus, whether dealing with testimonial or circumstantial evidence, the test for sufficiency of the evidence is whether the jury could reasonably, logically, and legally infer that the defendant was guilty beyond a reasonable doubt. *United States v. Jackson*, 700 F.2d 181, 185 (5th Cir.), *cert. denied sub nom. Hicks v. United States*, 464 U.S. 842, 104 S.Ct. 139, 78 L.Ed.2d 132 (1983).

1. Conspiracy

Count one of the indictment alleges that all appellants conspired to possess marihuana with the intent to distribute. To prove conspiracy under 21 U.S.C. § 846, the prosecution must show beyond a reasonable doubt (1) that there was an agreement to violate the narcotics laws; (2) that each appellant knew of the agreement and intended to join the conspiracy; and (3) that each appellant voluntarily participated. *United States v. Vergara*, 687 F.2d 57, 60-61 (5th Cir.1982). Concert of action can indicate agreement and voluntary participation. The surrounding circumstances may establish knowledge of a conspiracy. Also, the government need not prove an overt act in furtherance of the conspiracy to prove that a drug conspiracy existed. *United States v. Carter*, 953 F.2d 1449, 1454 (5th Cir.), *cert. denied sub nom Hammack v. United States*, ___U.S.___, 112 S.Ct. 2980, 119 L.Ed.2d 598 (1992).

After a meticulous review of the record, we hold that the evidence was sufficient for a reasonable jury to find each of the four defendants guilty of conspiracy beyond a reasonable doubt. We discuss separately the evidence relevant to each defendant.

a. De La Garza

Agent Botello testified that the confidential informant introduced him to De La Garza, with whom he discussed the purchase of a particular amount of marihuana for a specific price. Agent Saldivar then "flashed" $80,000 to indicate that the agents were willing to make the deal. Botello further testified that De La Garza introduced him to Ramirez, a "man that [Botello] needed to know." De La Garza participated in subsequent negotiations and attempts to conclude the sale, which finally was to occur on May 16, the day of the arrests. De La Garza testified, offering an innocent explanation for some of his actions and suggesting that the agents were lying about their conversations with him. But credibility is for the jury, which chose to believe the agents and not De La Garza. *Carter*, 953 F.2d at 1455. The evidence was sufficient for the jury to discredit De La Garza's explanation reasonably and permissibly and to find him guilty of conspiracy.

De La Garza argues that he could not have been part of the later operation because he was no longer present in the region at the time of the sale. It is not necessary for every co-conspirator to participate in every transaction, however, to be a member of a single conspiracy. *United States v. Stowell*, 947 F.2d 1251, 1258-59 (5th Cir.1991), *rehearing denied*, 953 F.2d 188 (5th Cir.) (per curiam), *cert. denied*, ___U.S. ___, 112 S.Ct. 1269, 117 L.Ed.2d 497 (1992). Additionally, the time when a member joined the conspiracy or the role he played is irrelevant to whether he is guilty of conspiracy, and he need not have known all of his co-conspirators. *Vergara*, 687 F.2d at 61.

De La Garza also asserts that he was entitled to a jury instruction on multiple conspiracies. The record shows that De La Garza failed to request such a jury instruction. thus there was no error.

b. Ramirez

Ramirez asserts that the government merely piled inference on inference and did not prove its case beyond a reasonable doubt. There was direct testimony, however, that Botello and Ramirez expressly negotiated the terms of the drug transaction after De La Garza introduced them. This alone is clearly sufficient evidence to justify a conviction for conspiracy. But in addition, at the second meeting on May 16, Ramirez agreed that he would pick up the owner of the marihuana and meet the agents at the load vehicle to conclude the deal. The jury properly could conclude that Ramirez violated the narcotics laws by negotiating and arranging the sale of the marihuana.

c. Delgado

Delgado's actions on May 16 constituted enough evidence for the jury to infer his agreement and participation from the "development and collocation of circumstances" and his knowledge from the surrounding circumstances. *Vergara*, 687 F.2d at 61. The agents testified that on May 16 they agreed with Ramirez to meet at the load vehicle. The agents then proceeded to Delgado's house, expecting the load vehicle to be there. When they did not find the truck, Delgado led them up the street to his parents' house, parked behind the truck, and waited

for fifteen to twenty minutes until Ramirez arrived. Finally, when the arresting officers burst onto the scene, Delgado immediately fled.

While flight alone is insufficient to support a guilty verdict, it is relevant and admissible, and the jury could take into account Delgado's flight. *United States v. Flores*, 564 F.2d 717, 718-19 (5th Cir.1977). Taking Delgado's actions in the context of the surrounding circumstances and in conjunction with both Ramirez's actions and the presence of 432 pounds of marihuana, the jury properly concluded that Delgado was guilty in the conspiracy.

d. Lopez

Lopez argues that he was merely present at the house on Harvey Street and that the evidence did not establish his involvement in the conspiracy. The evidence, however, supports the jury verdict.

Lopez established though his own testimony that he owned the property on Two Mile Line Road. Surveillance agents testified that they followed Ramirez to the property several times and observed Lopez's vehicle near the gate. On May 8, Ramirez left the undercover agents in order to locate the marihuana, and he traveled to the Two Mile Line property. On May 16, Ramirez first led Botello and Saldivar to the Two Mile Line Property to conclude the deal, but the agents refused to enter the property. Later that day, Ramirez told Botello he was going to pick up "the individual that was to get paid for the marihuana," and drove a Suburban to the Two Mile Line property, where he picked up an unidentified man. From

there Ramirez went directly to Delgado's parents house where the agents and Delgado waited by the load vehicle, and Lopez emerged from the Suburban. According to Saldivar, who was opening the load vehicle to examine the drugs, Lopez approached him and asked what he was doing. Saldivar responded that he was checking the marihuana. Lopez then walked to where Delgado was sitting nearby and fled with Delgado at the appearance of the arresting officers.

Lopez testified that he was present at the scene because he had offered Ramirez the Suburban as compensation for construction work, and Ramirez was returning the Suburban to him. The jury obviously did not believe him. It was reasonable to conclude that Lopez was the owner of the marihuana because Ramirez went to pick up the owner and retuned with Lopez to the site of the drug deal. The jury reasonably could discredit Lopez's explanation about returning the Suburban because he arrived as a passenger, exited the car while Ramirez remained in the driver's seat, and walked up to the agent at the load vehicle. Considering those inferences along with Lopez's conversation with Saldivar, his sitting down with Delgado, and his flight from the scene, the jury justifiably found beyond a reasonable doubt that Lopez knew of the conspiracy, agreed to it, and participated by arriving to conclude the drug sale.

Lopez relies on several cases to argue that the evidence was insufficient to prove his knowing participation in the conspiracy. The cases are distinguishable. In *United States v. Longoria*, 569 F.2d 422 (5th Cir. 1978), one defendant was the passenger in a car carrying marihuana. Lopez, however, was not merely an innocent passenger.

Ramirez specifically stated that he was going to pick up the marihuana's owner, and he returned with Lopez. In *United States v. Jackson*, 700 F.2d 181 (5th Cir.1982), *cert. denied sub nom. Hicks v. United States*, 464 U.S. 842, 104 S.Ct. 139, 78 L.Ed.2d 132 (1983), a man joined friends in a restaurant while they were transacting a drug deal and sat, saying nothing. Lopez, on the other hand, did not appear unexpectedly, and he spoke with Saldivar about the drugs. In *United States v. Caro*, 569 F.2d 411 (5th Cir.1978), Caro resembled an unidentified man involved in a drug transaction, and he fled when police came to his home to question him. Caro, however, was never identified at the scene of a drug transaction; Lopez was. Finally, in *United states v. Sacerio*, 952 F.2d 860 (5th Cir. 1992), a man was paid to drive a rental car to New Orleans. After police impounded the car and discovered drugs, the defendants' behavior in trying to retrieve the car was consistent with innocence. Again, Lopez arrived after Ramirez left to retrieve the drugs' owner and fled when officers appeared. These cases are not persuasive. Lopez was far more deeply involved in the criminal activity than any of the defendants in these cases.

2. *Possession*

Ramirez, Delgado, and Lopez assert that the evidence was insufficient to support their convictions for possession with intent to distribute. The government must prove three facts to sustain the convictions: (1) that each defendant knowingly (2) possessed the drug (3) with the intent to distribute. *United States v. Vergara*, 687 F.2d 57, 61 (5th Cir. 1982). Possession may be actual or constructive, joint among several defendants, and established by

circumstantial evidence. This court has defined constructive possession as "the knowing exercise of, or the knowing power or right to exercise dominion and control over the proscribed substance." *Id.* (quoting *United States v. Glasgow*, 658 F.2d 1036, 1043 (5th Cir.1981)).

One who owns or controls a vehicle that contains contraband can be deemed to possess. *Vergara*, 687 F.2d at 61. Additionally, one who exercised dominion over premises where contraband is found can be deemed to possess. *United States v. Carter*, 953 F.2d 1449, 1456 (5th Cir.), *cert. denied sub nom. Hammack v. United States*, ___U.S.___, 112 S.Ct. 2980, 119 L.Ed.2d 598 (1992). Finally, the jury could infer the intent to distribute from possession of a large amount of drugs. *Vergara*, 687 F.2d at 62. Because 432 pounds of marihuana exceeds what anyone would have for personal use, the jury reasonably found that any defendant who possessed the marihuana had the intent to distribute.

Ramirez was obviously involved in possession. He arranged the drug deal and brought all the players together at the load vehicle's location. Additionally, the load vehicle belonged to Ramirez. Ownership, coupled with his knowledge that the drugs were in the vehicle, can amount to constructive possession. *Vergara*, 687 F.2d at 61.

Delgado's possession of the marihuana is also obvious. The agents first were directed to Delgado's house to find the load vehicle. Delgado then led them to his parents' house and parked behind the load vehicle. Finally, Delgado fled when the arresting officers appeared. Both his actions and the fact that he exercised

dominion over his parents' property support the conclusion that he knowingly and constructively possessed the marihuana. *Carter,* 953 F.2d at 1456.

Delgado's possession conviction is also proper under the aiding and abetting statute, 18 U.S.C. § 2. As a co-conspirator, Delgado is liable for the substantive offenses committed by other members of the conspiracy in furtherance of the common plan. *United States v. Alvarado,* 898 F.2d 987, 993 (5th Cir.1990); *see also Pinkerton v. United States,* 328 U.S. 640, 646-47, 66 S.Ct. 1180, 1183-84, 90 L.Ed. 1489 (1946). We can affirm Delgado's possession conviction on the basis of both his constructive possession and his status as a co-conspirator.

As for Lopez, the jury reasonably concluded that Lopez was the owner of the marihuana when he arrived at the load vehicle with Ramirez. This fact closely resembles evidence in *Alvarado.* In that case, Alvarado was negotiating a drug deal with an undercover officer. His co-defendant arrived when Alvarado said the drugs would arrive, and we held that the jury reasonably found the co-defendant to be the drugs' owner. *Alvarado,* 898 F.2d at 992. Lopez's conversation with Saldivar also provided evidence that Lopez knew the marihuana was in the pickup truck. Finally, he fled when the arresting officers appeared. The suspicious circumstances and the suggestion of ownership provide enough evidence to sustain the jury's finding of constructive possession. Lopez's conviction also can be sustained, of course, on the same co-conspirator grounds as Delgado's.

ADMISSION OF REMOTE CONVICTION

Lopez contends that the trial court erred in admitting for impeachment purposes a seventeen-year-old conviction for possession of marihuana. We review evidentiary rulings for abuse of discretion. *United States v. Acosta*, 763 F.2d 671, 693 (5th Cir.), *cert. denied sub nom. Weempe v. United States*, 474 U.S. 863, 106 S.Ct. 179, 88 L.Ed.2d 148 (1985).

Agent Saldivar had testified that Lopez came up behind him, looked into the pickup truck, and briefly discussed what Saldivar was doing with the marihuana. On his direct examination, however, Lopez denied both having a conversation with Saldivar and going to the pickup truck. On cross-examination, the government first asked Lopez about the disputed conversation with Saldivar, and then asked without objection whether Lopez knew what the marihuana in Government's Exhibit No. 1 was. When Lopez denied recognizing the drugs, the government inquired whether Lopez had ever seen marihuana in person. Over the defense's objections of irrelevance, Lopez answered that he had not. A bench conference followed, at which the district court refused to allow the government to pursue questions about a suspected arrest for possession of marihuana in 1974.

The next day, however, the government produced a record of a 1974 conviction for possession of marihuana and sought to introduce the conviction in order to impeach Lopez. The court held a lengthy bench conference on the record, considering arguments from both sides, and finally decided to admit the conviction for impeachment purposes. The court gave the jury a limiting

instruction both when the evidence was admitted and during the jury charge.

1. Improper Questioning

Lopez first argues that the court erred by allowing the government to question Lopez about whether he had ever seen marihuana. Defense counsel objected at trial that the question was irrelevant. Under Federal Rule of Evidence 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Saldivar had testified that Lopez looked into the pickup and knew that Saldivar was examining the marihuana. Lopez's direct testimony refuted Saldivar's testimony; whether Lopez recognized marihuana was relevant to his knowledge of the drug deal about to take place. It follows that the district court properly overruled the objection and allowed the question.

Lopez's complaint that the questioning went beyond the scope of direct must fail. Federal Rule of Evidence 611(b) defines the scope of cross-examination as "limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." The government's questions were not beyond the scope of direct examination. Lopez was offering his account of the events of May 16. Because some of Lopez's testimony directly contradicted Agent Saldivar's, the integrity of the judicial proceeding was not threatened by the government's

attempts to clarify the testimony and to question Lopez's credibility. Furthermore, because Rule 611 authorizes the district court to permit inquiry into further matters, it was within the court's discretion to allow the government to question Lopez about his knowledge of marihuana.

2. *Improper Impeachment*

Lopez next argues that the district court erred in admitting for impeachment purposes Lopez's 1974 conviction for possession of marihuana. Defense counsel offers several grounds for excluding the conviction, and the record reveals some confusion about the grounds for admitting the evidence. It is established, however, that a district court's reliance on improper grounds for admitting evidence will not amount to harmful error if other valid grounds for admission exist, because such a situation does not affect a defendant's substantial rights. *United States v. Blake,* 941 F.2d 334, 339 (5th Cir.1991) (citing *United States v. Cardenas,* 895 F.2d 1338, 1345 (11th Cir.1990) and *Collins v. Seaboard Coastline R.R. Co.,* 681 F.2d 1333, 1335 (5th Cir.1982)), *cert denied,* ___ U.S. ___, 113 S.Ct. 596, ___ L.Ed.2d ___ (1992).

a. Rules 608 and 609

The parties assert that Federal Rules of Evidence 608(b) and 609 apply to the admission of Lopez's remote conviction. In this instance, however, neither rule need be applied.

Federal Rule of Evidence 608(b) allows the cross-examiner to inquire into specific instances of conduct

concerning the witness's character for truthfulness or untruthfulness as long as the questioning is probative of credibility. Rule 608(b), however, prohibits the introduction of extrinsic evidence to attack the witness's credibility. First, evidence of a conviction is extrinsic evidence forbidden by this rule. Second, possession of marihuana is not an act that indicates a witness's character for truthfulness or untruthfulness. Third, Rule 608 refers to Federal Rule of Evidence 609, which expressly covers impeachment by evidence of a conviction.

At first look, Rule 609 seems to support admission because the rule allows impeachment with a prior conviction of a testifying defendant. Rule 609(a)(1) also requires the district court to determine that "the probative value of admitting this evidence outweighs its prejudicial effect to the accused." FED.R.EVID. 609(a)(1). The record reveals that the district court expressly considered the impeachment value of the prior conviction, the similarity of the crimes, and the centrality of Lopez's credibility. The court also implicitly balanced the probative value of the evidence with the prejudicial effect.

Rule 609(b), however, imposes a time limit. Convictions more than ten years old are inadmissible unless (1) the probative value of the conviction substantially outweighs its prejudicial effect and (2) the proponent gives the adverse party advance written notice of the intent to use the conviction. FED.R.EVID. 609(b). The intent of the notice provision is to prevent unfair surprise and to give the defendant's attorney the opportunity to prepare fully for trial. FED.R.EVID. 609 conference committee's note. Lopez's prior conviction occurred in 1974; because Lopez was given probation and was not confined, the date of

the conviction controls. The government failed to give advance written notice of its intent to offer the conviction. The court ruled, however, that this failure was not fatal because there was no unfair surprise.[1]

The fundamental problem with the application of either Rule 608 or 609 is that neither rule applies "in determining the admissibility of relevant evidence introduced to contradict a witness's testimony as to a material issue." *See, e.g., United States v. Opager,* 589 F.2d 799, 801-02 (5th Cir.1979) (holding that Rule 608 prohibits admission of extrinsic evidence to attack the witness's character for truthfulness, but does not apply to impeachment by contradiction) and *United States v. Johnson,* 542 F.2d 230, 234-35 (5th Cir.1976) (holding that Rule 609 governs credibility evidence, not contradiction). Federal Rule of Evidence 403 controls the admission of contradiction evidence, and the remote conviction, if admissible, was admissible under Rule 403 in preference to Rules 608 and 609.

b. Rules 402 and 403

Extrinsic evidence, which includes prior convictions is admissible under the general standards of Rules 402

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[1] The government had produced the defendant's rap sheet, and the prosecutor did not discover the 1974 conviction until the day before he offered it. Additionally, the district court noted that both sides had received actual notice of the prior conviction in the Pre-Trial Services Report prepared well in advance of the trial. *United States v. Capote-Capote,* 946 F.2d 1100, 1105 (5th Cir.1991), *cert. denied sub nom. Rodriguez v. United States,* ___ U.S. ___, 112 S.Ct. 2278, 119 L.Ed.2d 204 (1992).

and 403 to contradict specific testimony, as long as the evidence is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice. *United States v. Carter*, 953 F.2d 1449, 1458 (5th Cir.1992), *cert. denied sub nom. Hammack v. United States*, ___ U.S. ___, 112 S.Ct. 2980, 119 L.Ed.2d 598. Relevant extrinsic evidence is admissible to contradict and possibly disprove a witness's testimony about a material issue of the case. *Opager*, 589 F.2d at 803. Extrinsic evidence is material, not collateral, if it contradicts "any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true." *Carter*, 953 F.2d at 1458 n. 3 (quoting McCORMICK ON EVIDENCE § 47, at 112 (E. Cleary ed. 3d ed. 1984)) Finally, Rule 403 does not provide for a time limit like Rule 609 does.

In *Opager*, we determined that payroll records should have been admitted to condradict a witness's testimony that he had seen the defendant sell cocaine when they worked together in 1974. *Opager*, 589 F.2d at 800, 803. The records would have shown that the witness and the defendant had not worked together then, calling into question the witness's testimony. Likewise, in Carter, a misdemeanor conviction was admissible under Rule 403 to challenge a defendant's testimony that he was working during the period of time when he was convicted. *Carter*, 953 F.2d at 1458. In the case at hand, Lopez asserted on direct examination that he heard no response from Saldivar about drugs and that he never had seen and did recognize marihuana.

Rule 403 requires the court to weigh the probative value and the prejudicial effect[2] This circuit has consistently applied the two-part test established in *United States v. Beechum*, 582 F.2d 898 (5th Cir.1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979) and in *United States v. Robinson*, 700 F.2d 205, 213 (5th Cir.), *aff'd after remand*, 713 F.2d 110 (5th Cir.1983), *cert. denied*, 465 U.S. 1008, 104 S.Ct. 1003, 79 L.Ed.2d 235 (1984). Under *Beechum*, the court must first determine whether the conviction is relevant. Second, the court must decide that the probative value is not substantially outweighed by its prejudicial effect, as set forth in Rule 403. *United States v. Zabaneh*, 837 F.2d 1249, 1262-64 (5th Cir.1988). The district court properly found the conviction relevant. The record also supports the court in its holding that the weighing requirement was met.

3. Harmless Error

Regardless of which grounds justify admission of Lopez's remote conviction, to be reversible error the admission of the conviction must have substantially prejudiced Lopez's rights. *See* FED.R.EVID. 103(A) AND FED.R.CRIM.P. 52(a). Because Rule 403 provides valid grounds to admit the prior conviction, Lopez's rights

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[2] Rule 403 authorizes:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

FED.R.EVID. 403.

were not prejudicially affected. *United States v. Blake,* 941 F.2d 334, 339 (5th Cir.1991), *cert. denied,* ___ U.S. ___, 113 S.Ct. 596, ___ L.Ed.2d ___ (1992). The court also gave the jury limiting instructions to clarify the purpose of the evidence. *United States v. Farias-Farias,* 925 F.2d 805, 811-12 (5th Cir.1991). The district court in the instant case carefully admonished the jury to take the conviction as evidence impeaching the credibility of Lopez's testimony, and it repeated that instruction when it gave the jury charge. There was no error.

MOTIONS FOR SEVERANCE: De La Garza and Ramirez

Both De La Garza and Ramirez moved for severance. Before trial, De La Garza's attorney filed a Motion for Severance so that Ramirez could testify for De La Garza, because Ramirez refused to waive his Fifth Amendment rights by testifying in the joint trial. During trial, Ramirez's attorney orally moved for severance on two grounds: first, because the admission of Lopez's prior conviction would prejudice Ramirez, and second, because the government was unwilling to enter into a plea bargain unless all four defendants joined. Although Ramirez was willing to plea bargain, one of his co-defendants was not.

Generally, defendants who are indicated together are tried together. *United States v. Arzola-Amaya,* 867 F.2d 1504, 1516 (5th Cir.), *cert. denied,* 493 U.S. 933, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989). Under Federal Rule of Criminal Procedure 14, however, the trial court may grant a severance if the joinder of defendants prejudices one defendant. Because the decision lies within the trial

court's discretion, we do not disturb that decision unless we find abuse of that discretion. *Arzola-Amaya*, 867 F.2d at 1516.

To prove that the trial court abused its discretion, an appellant must show more than a better chance of acquittal in a separate trial. The appellant must show that he received an unfair trial, which "exposed [him] to compelling prejudice against which the district court was unable to afford protection." *United States v. Kane*, 887 F.2d 568, 571 (5th Cir.1989), *cert. denied sub nom. Weber v. United States*, 493 U.S. 1090, 110 S.Ct. 1159, 107 L.Ed.2d 1062 (1990). Additionally, the trial court must balance any prejudice to the defendant with the court's interest in judicial economy. *United States v. Harrelson*, 754 F.2d 1153 (5th Cir.), *cert. denied*, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241 (1985).

De La Garza argues that he was prejudiced by his inability to have Ramirez testify in his behalf, because Ramirez elected not to testify in the joint trial. Initially, De La Garza's Motion for Severance stated only that Ramirez would "likely testify" if the causes were severed. After the court pointed out that the motion lacked an affidavit, De La Garza's attorney filed his client's handwritten affidavit, which stated that Ramirez had said that he knew De La Garza had nothing to do with the conspiracy.

The district court properly denied De La Garza's Motion for Severance. To be entitled to severance so that a co-defendant may testify, De La Garza must show "(1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4)

that the co-defendant will in fact testify." *United States v. Williams*, 809 F.2d 1072, 1084 (5th Cir.), *rehearing granted and cause remanded*, 828 F.2d 1 (5th Cir.), *cert. denied*, 484 U.S. 896, 108 S.Ct. 228, 98 L.Ed.2d 187 (1987). In *Williams*, both Williams and his attorney presented the court with their affidavits stating that a co-defendant would testify, but they failed to offer an affidavit to that effect from the co-defendant. Consequently, we held that the district court properly denied William's Motion for Severance.

De La Garza's position is even weaker. Although his need for Ramirez's testimony is clear and the exculpatory nature of the testimony appears in De La Garza's affidavit, De La Garza offers little proof of the substance of the testimony and no proof that Ramirez would in fact testify. Defense counsel supplemented his motion with De La Garza's affidavit, but not even De La Garza stated that Ramirez would testify. Additionally, the court received no affidavit from Ramirez himself. De La Garza did not prove that he was entitled to severance, and the trial court properly denied his motion.

Ramirez moved for severance during trial, not in a pretrial motion as required by Federal Rule of Criminal Procedure 12(b)(5). Ramirez asserts that possible prejudice to him did not appear until the mid-trial introduction of Lopez's remote conviction. But it is well established that precise instructions, both during trial and in the jury charge, can cure such prejudice. *See, e.g., Williams*, 809 F.2d at 1084. Before admitting evidence of Lopez's prior conviction, the district court carefully instructed the jury to consider the evidence only with regard to Lopez. The district judge then repeated the limiting instruction when he delivered the jury charge.

Through those instructions the district court cured any prejudice to Ramirez that might have arisen from admitting Lopez's prior conviction.

Ramirez also contends that the government could have plea bargained with him alone if there had been a severance. He asserts that the denial resulted in a harsher sentence than he would have received had he been tried separately. There is, however, no constitutional right to a plea bargain, and the prosecutor has the discretion either to bargain or to go to trial. *United States v. Rankin*, 572 F.2d 503 (5th Cir.), *cert. denied*, 439 U.S. 979, 99 S.Ct. 564, 58 (L.Ed.2d 650 (1978).

Any prejudice arising from the admission of Lopez's conviction was cured by instruction, and no prejudice arose from the inability to accept a plea bargain. The district could not abuse its discretion in denying Ramirez's Motion for Severance.

MOTION FOR NEW TRIAL: De La Garza

On July 18, 1991, the jury found De La Garza guilty of conspiracy. De La Garza subsequently obtained new counsel, who filed a Motion for New Trial on September 4, 1991. Before sentencing on October 10, 1991, the district court took up and denied the motion as untimely filed. Under Federal Rule of Criminal Procedure 33, a defendant's motion for new trial is timely only if it is filed within "7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period." Otherwise, a defendant may file a motion for new trial within two years after final judgment, but solely on the ground of newly discovered evidence. The next day, De La Garza filed his Notice of Appeal, arguing that

he was entitled to a new trial because the affidavit supporting the motion presented newly discovered evidence.

Ramirez's affidavit, which De La Garza uses to support his motion, does not satisfy the "newly discovered evidence" requirement, as detailed in *United States v. Alvarado*, 898 F.2d 987, 994 (5th Cir.1990). First, Rule 33 does not embrace affidavits as newly discovered evidence. Second, not only was the possibility of Ramirez's testimony known to De La Garza at trial, but it was also the subject of his pretrial Motion for Severance. Third, Ramirez's testimony would serve as some impeachment of Officer Botello's testimony, but it is not likely that it would lead to an acquittal. Fourth, the record suggests that De La Garza failed to exercise due diligence in obtaining the affidavit. When De La Garza's attorney first presented his Motion for Severance, the district court gave him a few minutes to obtain an affidavit from Ramirez that Ramirez would testify about De La Garza's innocence at a separate trial. De La Garza's attorney did not obtain such an affidavit until October 3, 1991, a full two and a half months after the verdict. Because the affidavit does not satisfy the requirements of newly discovered evidence, the trial court did not abuse its discretion in denying De La Garza's Motion for New Trial.

De La Garza additionally argues that the trial court "should have allowed the motion and given it proper consideration" under *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In the first place, De La Garza's reliance on *Cronic* is misplaced. In *Cronic*, the defendant raised a claim of ineffective assistance of counsel in a motion for new trial that was filed two months after filing the notice of appeal. *Cronic*, 466 U.S. at 652,

104 S.Ct. at 2043. In a footnote, the Court explains that when a Rule 33 Motion for New Trial is filed pending appeal, the trial court has the jurisdiction to entertain the motion, either by denying it or by certifying to the appellate court its intention to grant the motion. *Cronic*, 466 U.S. at 667 n. 42, 104 S.Ct. at 2051 n. 42; *see also* FED.R.CRIM.P. 33. This court followed *Cronic* in *United States v. Fuentes-Lozano*, 580 F.2d 724 (5th Cir. 1978), *appeal after remand on other grounds*, 600 F.2d 552 (5th Cir.1979). De La Garza, however, filed his Motion for New trial before filing the Notice of Appeal. Therefore, the procedure outlined in *Cronic* and in *Fuentes-Lozano* in inapplicable.

In the second place, although the trial court denied the Motion because it was untimely, the judge stated on the record proper alternative grounds for denial:

> [E]ven if the Court could consider this I would still deny it because it is not newly discovered evidence as that is enunciated in the case law. . . . This was evidence that was available at the trial and before the trial and is not something that has now all of a sudden been discovered by the defendant. In fact, he had explored it before the trial. And therefore, the Court would have denied it even if it were a timely filed motion for new trial.

III. CONCLUSION

We affirm the convictions of all four defendants. The evidence is sufficient to sustain them. We also affirm the district court's decisions to admit the evidence of Lopez's

remote conviction and to deny De La Garza's Motion for New Trial and De La Garza and Ramirez's Motions for Severance.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN **District of** TEXAS

McALLEN DIVISION

UNITED STATES OF AMERICA

V.

EUGENIO OZUNA RAMIREZ JR.

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE

(Filed Oct. 26, 1991)

(For Offenses Committed On or After November 1, 1987)

Case Number: M-90-159-S1-03

Joe Chapa
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____.

[XX] was found guilty on count(s) 1 and 2 on July 18, 1991 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846, 841(a)(1), and 841(b)(1)(B)	Conspiracy to possess, with intent to distribute, more than 100 kilograms, but less than 1,000 kilograms of marihuana.	05/17/90	1
21 USC 841(a)(1), 841(b)(1)(B), and 18 USC 2	Possession, with intent to distribute, approximately 432 pounds of marihuana.	05/17/90	2

The defendant is sentenced as provided in pages 2 though 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[XX] It is ordered that the defendant shall pay a special assessment of $ 100.00 , for count(s) 1 and 2 , which shall be due [XX] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's
Soc. Sec. No.: 266-04-4451

Defendant's
Date of Birth: 08/15/53

Defendant's
Mailing Address:

Route 5, Box 2550-20
Edinburg, TX 78539

Defendant's
Residence Address:

October 10, 1991
Date of Imposition of Sentence

/s/ Ricardo H. Hinojosa
Signature of Judicial Officer

Honorable
Ricardo H. Hinojosa
U.S. District Judge
Name & Title of Judicial Officer

10/23/91
Date

Defendant: EUGENIO OZUNA RAMIREZ JR.
Case Number: M-90-159-S1-03

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 71 months as to each of Counts 1 and 2, said imprisonment terms to run concurrently to each other.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ___ a.m. / p.m. on _____.

[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.

[ ] as notified by the United States marshal.

[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on ____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: EUGENIO OZUNA RAMIREZ JR.
Case Number: M-90-159-S1-03
Judgment – Page 3 of 4

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years as to Counts 1 and 2.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[ ] The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendants shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: EUGENIO OZUNA RAMIREZ JR.
Case Number: M-90-159-S1-03 Judgment – Page 4 of 4

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): Paragraph #29

Guideline Range Determined by the Court:

Total Offense Level: 24

Criminal History Category: II

Imprisonment Range: 57 to 71 months

Supervised Release Range: 4 to 5 years

Fine Range: $ 10,000 to $ 2,000,000

[X] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6116

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELISEO DE LA GARZA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(Filed January 11, 1993)

Before KING, WILLIAMS and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing, as to Eliseo De La Garza, filed in above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ J. N. Williams
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF
THE MANDATE.

APPENDIX B

§ 841. Prohibited acts A

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign

country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.